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Vitachem (M) Sdn Bhd v Ing Hua Fu Marine Line Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–528–03 OF 2013
AZIAH ALI, ANATHAM KASINATHER AND UMI KALTHUM JJCA
21 FEBRUARY 2014

Tort — Negligence — Carriage of goods by sea — Sinking of vessel — Loss and damage — Liability — Claim by owner of vessel against shipper and freight forwarder — Causation — Whether cargo of agrochemicals had caused fire that led to sinking of vessel — Whether 'dangerous' nature of cargo known or should have been known — Whether contractual risk of shipment was undertook — Whether defendants negligent

Vitachem had shipped a cargo of agro-chemical products on board the plaintiff's vessel, the Ing Hua Fu No 9 ('the vessel'), at the Penang Port for delivery to its buyers in Miri. On the bill of lading ('B/L'), the cargo was described as 'agrochemicals' which were 'shipped on deck at shipper's risk'. The second defendant was the forwarding agent appointed by Vitachem to arrange for the shipment of the cargo. After the loading of the cargo in Penang had been completed, the vessel sailed to Port Klang to load further cargos. While the loading operation was being carried out, a member of the crew saw sparks from the location where the pallets of agrochemicals were stowed which was shortly followed by a fire and a very loud explosion. The ship sank bow or forward first. The plaintiff claimed against both the first and second defendants for all the losses it suffered as a result of the explosion and sinking of its vessel. The plaintiff's claim was founded on negligence, or bailment, or a breach of article IV r 6 of the Hague Rules as applied under the Carriage of Goods by Sea Act 1950 ('the Act'). The plaintiff contended that it was Vitachem's cargo of agrochemicals that had caused the fire which led to the sinking of the vessel and the attendant losses. The plaintiff's case against the second defendant was premised on a breach of warranty given by the agent or alternatively in the law of agency. The defendants wholly denied liability for the plaintiff's losses and claimed that since they had provided sufficient information pertaining to the nature and characteristics of the cargo to the plaintiff, the latter had knowledge and had consented to the carriage of such 'dangerous' cargo on board its vessel. In the High Court, the judge ruled in favour of the respondent carrier. Hence, the present appeal, the issues that arose were whether whether the cargo of six pallets delivered for carriage by the appellant were so fundamentally different from the cargo which the shipper contracted to deliver in terms of nature and character so as to entitle the respondent to claim that it never consented to carry this particular cargo; and whether the knowledge of the respondent is limited to what was made known to its officers orally or whether the knowledge

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of the respondent extends to the information contained in all the documents submitted by the appellant in connection with the shipment such as, on the facts of this case DCN1, DCN2, the packing list and shipping order; and whether on a balance of probabilities, it was the information concerning the cargo which the shipper failed to provide which directly or indirectly caused the loss of the vessel.

Held, allowing the appeal with costs here and below:

(1) The trial judge erred in holding the appellant to be in breach of contract. It was imperative for either the master or the chief officer of the vessel to have attended court and provided factual evidence as to how, in their experience, the cargo of agrochemicals tendered by the appellant would have behaved during the voyage and how, in fact, the cargo in Pallet No 5 consisting of allegedly incompatible chemicals actually behaved during the voyage by way of comparison. In the absence of such factual evidence by way of comparison and in the light of the admissions made by the respondent's expert witness, the trial judge was wrong to rule that the cargo in the pallets was fundamentally different from the cargo tendered by the appellant particularly in the light of the declaration that the cargo was dangerous (see para 39A(e)).

(2) To discharge the burden of proof vested on it in respect of this second factor, it was necessary for the respondent to lead evidence through the chief officer as to why he stowed the appellant' cargo on deck and under canvas when the cargo was declared to be dangerous. The law expects an explanation from the chief officer of the vessel for stowing the agrochemicals on the deck and under canvas before the carrier could be said to have discharged the burden of proving breach on the part of the shipper. The error that the trial judge fell into in the consideration of the second factor was that Her Ladyship proceeded on the premise that stowage was the responsibility of the shipper. It was settled law that stowage was the responsibility of the carrier. This error on the part of the trial judge in appreciating the responsibility of the carrier for the proper stowage of the agrochemicals (see para 39B(c)).

(3) In the absence of evidence forthcoming from the chief officer as to why he stowed the cargo on deck in the first place, and what other precautions he would have undertaken if he had the alleged additional information, the trial judge erred in drawing this inference favourable to the respondent. In drawing this inference favourable to the respondent, the trial judge also failed to appreciate the unchallenged evidence that the respondent was familiar with the packing of the appellant's cargo including Pallet No 5 and must have caused the issuance of the clean bill of lading after being satisfied that the appellant's cargo was suitable for safe carriage during the voyage (see para 39B(d)).

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(4) Her Ladyship's finding that the appellant's cargo must have leaked, spilled and/or comingled was not supported by the evidence before the court. Her Ladyship's findings on the suitability of the mode of packing adopted by the appellant and how this may have contributed to the explosion completely disregard the unchallenged evidence that the chief officer had examined the cargo and all of the shipping documents before instructing Luka to load the appellant's cargo on board the vessel. It is settled law that the carrier is treated as having notice of the dangerous character of the goods if he has had a full opportunity of observing the dangerous character of such goods (see para 42(a) & (b)).

(5) It is no part of the duty of the shipper to instruct the carrier on how and where it should stow the cargo. Indeed, as explained earlier in this judgment, the duty of the carrier on matters relating to stowage are such that the carrier is not bound by any instructions furnished to him by the shipper or charterer on matters relating to stowage. Accordingly, the trial judge erred in finding the appellant's failure to give such instructions as part of the cause for the explosion. However, in practice, it is not unusual for a carrier to follow the instructions of the shipper or charterer as regards the stowage of the goods conditional on the shipper or charterer providing a suitable indemnity for any damage suffered by the carrier in following any such instructions of the shipper/charterer. This was not the case here (see para 42(d)).

(6) This is one of those cases where the explosion may very well have been due neither to the unusual nature of the cargo nor to any short comings in the carrier, but to simple misfortune. In such cases, the risk of the accident falls on the carrier. However, the failure of any senior member of the crew of the vessel to give evidence and the absence of a suitable adjustor's report of the incident has played a big part in the finding that this accident might simply be a case of misfortune (see para 45).

[Bahasa Malaysia summary

Vitachem telah menghantar satu kargo produk agrokimia ke atas kapal plaintif, Ing Hua Fu No 9 ('kapal itu'), di Pelabuhan Pulau Pinang untuk penghantaran kepada pembelinya di Miri. Atas bil muatan ('B/M'), kargo itu dinyatakan sebagai 'agrokimia' yang telah 'dihantar ke geladak atas risiko pengirim muatan itu'. Defendan kedua adalah ejen penghantar yang dilantik oleh Vitachem untuk mengatur penghantaran kargo itu. Selepas muatan kargo di Pulau Pinang selesai, kapal itu telah belayar ke Pelabuhan Klang untuk memuatkan kargo selanjutnya. Semasa operasi pemuatan sedang dijalankan, soerang daripada anak kapal melihat percikan api dari lokasi di mana palet-palet agrokimia disimpan yang diikuti sejurus kemudian dengan kebakaran dan letupan kuat. Kapal itu telah tenggelam bahagian hadapan dahulu. Plaintif menuntut terhadap kedua-dua defendan pertama dan kedua untuk semua kerugian yang dialaminya akibat letupan dan kapalnya yang tenggelam.

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Tuntutan plaintif adalah berasaskan kecuaian, atau bailmen, atau pelanggaran artikel IV kaedah 6 Kaedah-Kaedah Hague sebagaimana yang terpakai di bawah Akta Pengangkutan Barang Melalui Laut 1950 ('Akta tersebut'). Plaintif telah berhujah bahawa ia adalah kargo Vitachem berhubung agrokimia itu yang telah menyebabkan kebakaran yang mengakibatkan kapal itu tenggelam dan kerugian petugas. Kes plaintif terhadap defendan kedua adalah berpremiskan pelanggaran jaminan yang diberikan oleh ejen itu atau secara alternatif dalam undang-undang agensi. Defendan-defendan menafikan sepenuhnya liabiliti untuk kerugian plaintif dan mendakwa bahawa oleh kerana mereka telah memberikan maklumat mencukupi berkaitan sifat dan ciri-ciri kargo kepada plaintif, plaintif mempunyai pengetahuan dan telah bersetuju untuk pengangkutan kargo 'berbahaya' di atas kapalnya. Di Mahkamah Tinggi, hakim membuat keputusan yang menyebelahi pengangkut responden. Justeru, rayuan ini, isu-isu yang timbul adalah sama ada kargo untuk enam palet yang dihantar untuk pengangkutan oleh perayu amat berbeza daripada kargo yang penghantar membuat kontrak untuk menghantar dari segi sifat dan ciri-ciri sehingga melayakkan responden menuntut bahawa ia tidak pernah bersetuju untuk membawa kargo tertentu ini; dan sama ada pengetahuan responden adalah terhad kepada apa yang dijadikan untuk pengetahuan pegawai-pegawainya secara lisan atau sama ada pengetahuan responden meliputi maklumat yang terkandung dalam semua dokumen-dokumen yang dikemukakan oleh perayu yang berkaitan dengan penghantaran tersebut seperti, berdasarkan fakta kes ini DCN1, DCN2, senarai pembungkusan dan pesanan penghantaran; dan sama ada atas imbangan kebarangkalian, ia adalah maklumat berkaitan kargo itu yang mana gagal dikemukakan oleh pembawa muatan yang secara langsung dan tidak langsung menyebabkan kehilangan kapal itu.

Diputuskan, membenarkan rayuan dengan kos di sini dan di Mahkamah Tinggi:

(1) Hakim perbicaraan terkhilaf dalam memutuskan perayu telah melanggar kontrak. Adalah penting untuk Ketua atau Ketua Pegawai kapal itu untuk hadir di mahkamah dan mengemukakan keterangan faktual tentang bagaimana, dalam pengalaman mereka, keadaan kargo agrokimia yang ditenderkan oleh perayu semasa pelayaran itu dan bagaimana, pada hakikatnya, kargo dalam Palet No 5 yang mengandungi bahan kimia dikatakan tidak serasi sebenarnya bertindak semasa pelayaran secara perbandingan dan berdasarkan pengakuan yang dibuat oleh pakar saksi responden, hakim perbicaraan terkhilaf dalam memutuskan bahawa kargo dalam palet-palet itu amat berbeza daripada kargo yang ditenderkan oleh perayu khususnya berdasarkan pengakuan yang kargo itu adalah berbahaya (lihat perenggan 39A(e)).

(2) Untuk melepaskan beban bukti yang terletak padanya berkaitan faktor kedua ini, adalah perlu bagi responden untuk mengemukakan

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keterangan melalui ketua pegawai berhubung kenapa dia menyimpan kargo perayu di geladak dan di bawah kain kanvas apabila kargo itu diumumkan berbahaya. Undang-undang menjangkakan penjelasan daripada ketua pegawai kapal itu kerana menyimpan agrokimia di geladak dan di bawah kain kanvas sebelum pengangkut boleh dikatakan telah melepaskan beban membuktikan pelanggaran di pihak pengangkut. Adalah undang-undang tetap bahawa penyimpanan adalah tanggungjawab pengangkut. Kekhilafan ini di pihak hakim perbicaraan untuk memahami tanggungjawab pengangkut untuk penyimpanan wajar agrokimia (lihat perenggan 39B(c)).

(3) Dengan ketiadaan keterangan daripada ketua pegawai berhubung kenapa dia menyimpan kargo digeladak pada mulanya, dan apa langkah-langkah lain yang dia mungkin ambil jika dia mempunyai maklumat tambahan yang dikatakan itu, hakim perbicaraan terkhilaf dalam membuat inferens ini yang menyebelahi responden. Dalam membuat inferens ini yang menyebelahi responden, hakim perbicaraan juga gagal untuk memahami keterangan yang tidak dicabar bahawa responden biasa dengan pembungkusan kargo perayu termasuk Palet No 5 dan telah menyebabkan keluaran bil muatan yang bersih selepas berpuas hati bahawa kargo perayu sesuai untuk pengangkutan yang selamat semasa pelayaran (lihat perenggan 39B(d)).

(4) Yang Arif Hakim membuat penemuan bahawa kargo perayu mungkin telah mengalami kebocoran, tumpahan dan/atau kedua-duanya yang tidak disokong dengan keterangan di hadapan mahkamah. Penemuan Yang Arif Hakim berhubung kesesuaian cara pembungkusan yang digunakan oleh perayu dan bagaimana ini mungkin telah menyumbang kepada letupan itu langsung tidak diambil kira keterangan yang tidak dicabar bahawa ketua pegawai telah memeriksa kargo itu dan semua dokumen pengangkutan sebelum mengarahkan Luka untuk memuatkan kargo perayu ke atas kapal itu. Adalah undang-undang tetap bahawa pengangkut itu dianggap telah memberi notis tentang ciri-ciri berbahaya barangan itu jika dia mempunyai peluang sepenuhnya untuk meneliti ciri-ciri berbahaya barangan tersebut (lihat perenggan 42(a) & (b)).

(5) Ia bukan sebahagian daripada tugas pengangkut untuk mengarahkan pengangkut bagaimana dan di mana ia patut menyimpan kargo itu. Sememangnya, sebagaimana dijelaskan terdahulu dalam penghakiman ini, tugas pengangkut berhubung perkara-perkara berkaitan penyimpanan adalah bahawa pengangkut tidak terikat oleh apa-apa arahan yang diberikan kepadanya oleh pengangkut atau pencarter berhubung perkara-perkara berkaitan penyimpanan. Sewajarnya, hakim perbicaraan terkhilaf kerana gagal mendapati bahawa perayu telah gagal memberikan arahan sedemikian sebagai sebahagian daripada sebab letupan itu. Walau bagaimanapun, secara amalan, ia bukan tidak biasa

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untuk pengangkut untuk mengikut arahan pengangkut atau pencarter berhuubng penyimpanan barangan yang bersyarat atas pengangkut atau pencarter memberikan perlindungan yang sesuai untuk apa-apa kerosakan yang dialami oleh pengangkut dalam mengikut apa-apa arahan pengangkut atau pencarter. Ini bukan kesnya di sini (lihat perenggan 42(d)).

(6) Ini adalah salah satu kes di mana letupan mungkin bukan berlaku akibat sifat luar biasa kargo itu atau apa-apa kelemahan dalam pengangkut itu, tetapi disebabkan nasib malang yang mudah. Dalam kes sedemikian, risiko kemalangan terletak pada pengangkut. Walau bagaimanapun, kegagalan mana-mana ahli kanan anak kapal itu untuk memberikan keterangan dan ketiadaan laporan penaksir yang sesuai berhubung kejadian itu memainkan peranan penting dalam penemuan bahawa kemalangan ini mungkin satu kes nasib malang yang mudah (lihat perenggan 45).]

Notes

For cases on carriages of goods by sea, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1099–1104.

Cases referred to

Athanasia Comninos' v Georges Chr Lemos [1990] Vol 1 Lloyd's Rep 277, QB (refd)

Atlantic Oil Carriers Ltd British Petroleum Company, Ltd (The Atlantic Duchess') [1957] 2 Lloyd's Rep 55 (refd)

Brass v Maitland (1856) E&B 470 (refd)

'Mahia', The (1955) 1 Lloyd's Rep 264 (refd)

Sunrise Crane, The [2004] 4 SLR 715, CA (not folld)

Legislation referred to

Carriage of Goods by Sea Act 1950 s 2

Appeal from: Admiralti in rem No 27–43–11 of 2011 (High Court, Kuala Lumpur)

Sitpah Selvaratham (Jeremy Joseph with him) (Joseph & Partners) for the appellant.

Philip Teoh (Philip Teoh & Co) for the respondent.

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Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] As the facts have been comprehensively set out in the judgment of the learned trial judge, we do not propose in this judgment to set out the facts in detail. The following facts, however, are pertinent to our judgment. Following an explosion at Wharf No 7 Southpoint Port Kelang on 18 October 2008, the entire vessel Ing Hua Fu No 9 ('the vessel') sank. At the material time, there was on board the vessel a consignment of cargo of agrochemicals shipped on board by the appellant. The cargo incorporated the following chemicals:

S/No	Name of Chemical	UN No	IMO Class No
1	CH Malaxion 84.0	3082	9
2	Dianet	3017/3018	6.1
3	CH Amine 48	2734/2735	8
4	CH Amine 60	2734/2735	8
5	CH Malaxion 570 E	3082	9
6	CH Fention 50	3017/3018	6.1
7	Vita Dimethoate	3017/3018	6.1
8	CH Sodium Chlorate	1495	5.1

The Bill of Lading ('B/L') described the cargo as '6 pallets said to contain 185 packages (30 bags and 155 cartons) AgroChemicals'. The shipment was arranged by the appellant's forwarding agent, Syarikat Penghantaran dan Pengangkutan Heng Sdn Bhd ('the forwarders') with the respondent carrier's agent, Syarikat Soo Hup Seng Sdn Bhd ('Soo Hup Seng').

[2] Upon confirmation of the procurement of such space, Soo Hup Seng advised the forwarders of the name of the vessel, its dates and time of arrival in port and other relevant details. Thereafter the forwarders having acquired these details from Soo Hup Seng, completed a dangerous goods declaration to the Penang Port Commission. This form is called the 'Advance Notification and Declaration of Packed and Containerised Dangerous Goods for Conveyance/Handling' at Penang Port Commission for short 'DCN1'. DCN1 incorporated information pertaining to the technical name of the substance, properties and flash point, quantity and description of packing, IMO class, UN Number as well as the weight of the cargo. The appellant did not acknowledge in this document the existence of any known defect, undue hazard and suggested safe handling method in answer to one of the questions in this document.

[3] The forwarders obligations as the forwarding agent of the appellant included the preparation of the customs declaration form and a further notification to the Penang Port Commission by completing a document

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known as 'DCN2'. DCN2 is a standard form containing the approval sought from the Penang Port Commission for the transportation of dangerous goods and any other instructions pertaining to the goods. The forwarders duly declared the cargo as dangerous goods to the Penang Port Commission in DCN2. DCN2 was transmitted on-line to the Penang Port Commission for their approval upon completion. The forwarders maintained that they also transmitted these documents to Soo Hup Seng on 13 November 2008, but this is strongly disputed by Soo Hup Seng. The forwarders received the requisite approval from the Penang Port Commission on the same day, ie on 13 November 2008. The Penang Port Commission had given its approval stating that the cargo fell within Group 2 and required direct delivery and loading. According to the forwarders, it downloaded DCN2 and the customs approval and faxed the same to the shippers, as well as Soo Hup Seng. Again, Soo Hup Seng denies that any such documents were made available to it or faxed to it. It is not in dispute that Soo Hup Seng is linked to the on-line system with the Penang Port Commission.

[4] The vessel was loaded with the cargo at the Penang Port on 16 October 2008. The loading was undertaken by the forwarders' employees and according to one of them, Mohamad Fazil bin Mohamed Ali Jinnah, he placed 'SPONTANEOUSLY COMBUSTIBLE' stickers on all the six pallets containing the cargo. He also gave evidence that the cargo and all requisite documents including DCN2, the packing list and shipping order were inspected by the chief officer of the vessel when the vessel was brought alongside the vessel. Following such inspection, the cargo was marked and loaded onto the vessel on the starboard side at the bow or forward part of the main deck. Upon completion of loading, the forwarding agent issued a shipping instruction to Soo Hup Seng instructing Soo Hup Seng to issue a bill of lading. A clean Bill of Lading was issued on 18 October 2008, confirming that the cargo was shipped in apparent good condition. The Bill of Lading is consonant with the stowage plan in that it denotes that the six pallets were stored on deck. On the bill of lading the cargo is described as 'Agro Chemicals'. The Bill of Lading also specified 'shipped on deck at shipper's risk'.

[5] After loading of the cargo in Penang had been completed, the vessel sailed to Port Klang to load further cargo. It arrived at Southpoint, North Port at about 9.30 hours on 18 October 2008. The loading operation commenced at about 10am. There was no discharging operation. Four stevedores worked inside the hold with three hatches at the forward opened for the loading. A break was taken for lunch between 12 noon and 1pm. Loading resumed at 1pm with a coffee break from 3.30pm to 4pm. Loading recommenced at 4pm. The respondent's case and as borne out by the available evidence is that a member of the crew of the vessel, one Hajeh Anak Luka, PW 2 ('Luka') was operating a crane to load the vessel with cargo when he saw sparks at the location where the

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pallets of agrochemicals were stowed. He testified that he saw three sparks, and subsequently thick smoke. This was followed by a fire within a few seconds. Luka estimated that about five to seven minutes after sighting the sparks, there was a very loud explosion. The time of the explosion was about 4.20pm to 4.30pm on 18 October 2008.

DECISION OF THE HIGH COURT

[6] The learned High Court judge ruled in favour of the respondent carrier. Her Ladyship's ruling was premised on the following core grounds.

Duty of the appellant to provide information concerning the nature and characteristics of the contents of the cargo

Her Ladyship acknowledged that the respondent was aware that the goods were 'dangerous' goods since, inter alia, they charged a fee based on the dangerous goods. Arising from this fact, Her Ladyship posed the following question:

> However is this in itself sufficient to amount to 'knowledge of their nature and character'? It appears to this court that the crucial question or issue for consideration is whether by simply signifying goods as 'dangerous' and specifying their chemical names, this is sufficient to discharge the burden placed on the shipper of ensuring that the carrier has 'knowledge of the nature and character of the goods' such that it can be said he has consented to assume or bear the risk of shipment of such goods. Acceptance by the carrier of the goods with knowledge of their dangerous character is deemed consent to accept the risks of carrying such goods.
>
> (See para 85 (f) of the judgment of the High Court ('the judgment').

[7] Her Ladyship answered the aforesaid question by holding that in certain situations where sodium chlorate is subjected to heat, friction or co-mingles with incompatible chemicals it can cause fire and be an explosion hazard. In Her Ladyship's view, the key question was whether the carrier's agent or the carrier was made aware of this particular nature or kind of danger. Additionally, whether the fact that Pallet No 5 contained incompatible chemicals which had been packed together had been made known to the carrier's agent or the carrier. In this respect, Her Ladyship acknowledged that it may well be the case that if there had been no ignition caused by friction or heat that the explosion might not have occurred. Her Ladyship then proceeded to hold the appellant liable for the explosion since, according to Her Ladyship, prevention of the ignition by heating required specific steps taken to obviate the possibility of overheating through raised temperatures and avoiding friction. The appellant was at fault in failing to provide the carrier with the required specific instructions on the method of stowage.

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[8] It was also the finding of the learned judge that the kind of risk to which the respondent consented can be deduced from the kinds of precautions which it in fact did take. In the instant case, it would appear that the carrier was aware that the goods were dangerous goods because they were stowed on deck and covered with canvas. However, according to Her Ladyship, it was equally clear that no steps were taken to avoid friction which is a trigger factor for ignition and subsequent fire and explosion. Neither were steps taken to store the cargo in a dry or cool place as heat is another trigger for the hazard that in fact, transpired. As the carrier's precautions were appropriate for the kind of goods described in the contract, namely agrochemicals, but insufficient for the particular goods shipped, namely the mixture in Pallet No 5 ie sodium chlorate together with amines and Malaxion, Her Ladyship held that liability for the loss and damage suffered under article IV rule 6 falls squarely on the shipper.

Burden of proof

[9] In para 77 (g) of Her Ladyship's judgment, Her Ladyship ruled that the respondent had discharged the initial burden vested on it of proving causation to be that of the appellant, by virtue of the superior evidence provided by its expert. The basis for this conclusion being that unlike the appellant's expert, the respondent's expert had undertaken a complete analysis of the events from beginning to end to ascertain the cause of explosion. According to the learned trial judge, this served to shift the burden to establish the cause of the explosion to the appellant. To the extent that the appellant 'simply offered a plea of cause not proved', Her Ladyship concluded that the appellant had failed to discharge this burden thereby inviting liability upon itself.

Causation

[10] On causation, Her Ladyship ruled the cause of the explosion on the vessel to be due to friction and/or increased temperature coupled with the packing of the mutually incompatible chemicals together in Pallet No 5. The learned trial judge sought to overcome the absence of any factual evidence as regards the 'behavior' of the appellant's cargo during the voyage by holding that since there was no evidence that the pallets were securely sealed so as to preclude the possibility of leaking, spilling or intermingling, 'the sequence of events leads, almost inevitably to the conclusion that there was indeed an intermingling of the chemicals'. In Her Ladyship's view, this intermingling coupled with the high temperatures in the pallets would have had consequential effect on the chemicals particularly since the vessel was in constant motion. For this reason, Her Ladyship ruled that the pallets should have been segregated 'to preclude the effects of friction on the floor of the vessel' (see paras 77(b) and (c) of the judgment).

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[11] Her Ladyship then proceeded in para 114 of the judgment to rule that even if Her Ladyship's findings on causation were wrong in law, the appellant was still liable because 'the explosion could not have occurred without the shipment of these pallets'. The reasoning being that but for the carrier being called upon to load and carry these pallets, the explosion would not have taken place at all. The learned trial judge's reasoning to this effect was no doubt influenced by the pronouncements of Mustill J and quoted by the learned trial judge in para 113 of Her Ladyship's judgment:

> It seems to me perfectly possible to have a loss which is caused by the shipment of a cargo having certain properties, even if the properties of the cargo in question are no different from those of other cargoes of the same description. In the present case, if one asks the question (eliminating the possibility of fault on the part of the ship owner) 'Why was there an explosion?' the answer is — 'Because there was methane in the hold' And if one goes on to ask 'Why was there methane in the hold? The answer is — 'Because the Time Charterers called on the vessel to load coal.' This answer is in my opinion sufficient to found an indemnity, without any proof that the coal was in any way unusual.

THE APPELLANT'S CASE

Duty of the appellant to provide information concerning the nature and characteristics of the contents of the cargo

[12] Learned counsel for the appellant adverted to the summary of the law on article IV r 6 as extracted from Aiken, Lord & Bools on *Bills of Lading*, 2006. This summary is that:

(a) a shipowner who consents to carry goods of a particular description, contracts to perform the carriage in a manner appropriate to goods of that description, and thereby assumes all risks of accidents attributable to a failure to carry in the manner;

(b) in the case of goods where even the accepted method of carriage will not eliminate the possibility of accident, the risk of such an accident is on the carrier;

(c) before a court can conclude that a shipper, such as Vitachem, has breached its duty by not disclosing that the cargo is of a dangerous nature, the cargo itself must pose a hazard which is of a totally different kind (whether in nature or degree) from those attached to the carriage of the cargo described, and the shipper failed to notify the carrier, of this particular hazard;

(d) in considering what is the appropriate method of carriage, the carrier is not expected to have the knowledge of an expert chemist but must adopt the modern practices of which he could reasonably be expected to become aware; and

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(e) the knowledge of the carrier includes that which he and the crew ought to have.

[13] Learned counsel for the appellant then submitted that where the carrier has no knowledge of the nature and character of the Dangerous Goods, article IV r 6 provides for an indemnity, without proof of fault or neglect on the part of the shipper. In contrast, where the carrier knows the nature and character of the dangerous goods, but there is an alleged breach by the shipper of its obligations, such as insufficient packing, article IV r 2 and 3 require the owners to prove fault or neglect on the part of shipper. Article IV r 2(i), (n) and r 3 provide as follows:

> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> (i) Act or omission of the shipper or owner of the goods, his agent or representative;
>
> (ii) Insufficiency of packing;
>
> (3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising from any cause without the act, fault or neglect of the shipper, his agents or his servants.

[14] Learned counsel for the appellant then adverted to the finding of the learned trial judge that the information disclosed in the Shipping Document, including the Dangerous Goods Declarations (DCN1 and DCN2) made to the Penang Port Commission were insufficient to convey to the owners the precise nature and character of the cargo and of its the potential risks. The learned judge held that the appellant, as shipper, had the additional burden to disclose the specific dangers and risks posed by each of the chemicals, particularly the chemicals packed together in Pallet No 5, and to inform the owners of how the cargo should be handled and stowed. Her Ladyship's finding was that since there was insufficient declaration by the shipper, the owners did not know the risk attached to the carriage of the cargo. This, in turn, led to Her Ladyship's ruling that the appellant was therefore under a strict liability to indemnify the owners for all losses under article IV r 6 of the Hague Rules.

[15] Learned counsel for the appellant submitted that the aforesaid ruling of the learned trial judge totally ignored the respective roles of the shipper and the carrier. The carriers are the experts on carriage and stowage on board their vessel, not the appellant who is a mere shipper. Article III r 2 of the Hague Rules specifically demarcates the obligations of loading, handling and stowage of cargo, and places it upon the carrier. Learned counsel for the appellant submitted that the approach taken by the learned judge is therefore contrary to the law. The ratio in the decision of the English Court in the case of *Brass v*

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Maitland (1856) E&B 470 was relied upon by counsel in support of this proposition.

[16] Learned counsel for the appellant also highlighted the fact that the respondent did not deny the receipt of the documents which would have afforded them the necessary knowledge of the manner in which the cargo had been packed including the contents of Pallet No 5, as much as being uncertain about the receipt of these documents. Learned counsel for the appellant submitted that based on this evidence and the declaration by the appellants that the cargo was dangerous cargo, Her Ladyship ought to have held that the respondent had sufficient knowledge of the nature and character of the cargo before accepting the cargo for shipment and carriage on board the vessel. By reason thereof, learned counsel submitted that the learned trial judge ought to have held that the respondent carrier agreed to bear the risk of carriage of the cargo which were toxic, inflammable, combustible, with oxidizing agent, including whatever damage or loss that directly or indirectly arose from such shipment. The carrier is therefore, not entitled to any indemnity under article IV r 6. On the contrary, learned counsel for the appellant submitted that the carrier was clearly in breach of its obligations of due stowage, care and handling of the cargo, despite knowledge of it being dangerous goods. The carrier having admitted in para 9 of the statement of claim that they did not handle the cargo as dangerous goods.

Burden of proof

[17] Learned counsel for the appellant submitted that for the respondent to succeed in its claim, it had to establish either that the explosion was caused by the cargo or, at the least, of proving that the cargo presented a really different danger outside the range of danger which a carrier of agrochemicals such as CH Amine, Malaxion and Sodium Sulphate had to foresee and guard against. A passage in the judgment of Justice Mustill in The '*Athanasia Comninos*' *v Georges Chr Lemos* [1990] Vol 1 Lloyd's Law Reports 277 that:

> The Plaintiffs have the burden of proving that the shipment of cargoes created risks which they never contracted to bear. At the most, they have raised a suspicion that the cargoes were more gassy on shipment than the majority of coal cargoes. This is not enough. (at p 289)

and in the judgment of Justice Pearson in *'Atlantic Duchess'* [1957] 2 Lloyd's Rep 55:

> But here the burden of proof is clearly on the Plaintiffs, and they have failed to prove their case. The Plaintiffs have not proved that the vapour emitted by the botanized crude oil would be, to any appreciable extent, more persistent than the vapour emitted by the unbutanised crude oil. (at p 120)

were cited in support of this proposition.

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[18] Learned counsel for the appellant submitted that based on the aforesaid pronouncements, the respondent had clearly not discharged its burden of proof. Counsel submitted that the learned trial judge had no evidence upon which to infer a special hazed posed by Pallet No 5 especially based on the clear explanation of the appellant's expert and the concession made by the respondent's expert Cik Aini (PW 4). The concession being her acknowledgment that her theories on causation were not supported by facts.

Causation

[19] Learned counsel for the appellant submitted that the learned trial judge's finding on causation was primarily that sodium chlorate and other incompatible chemicals when ignited by friction and/or heat, can catch fire and explode and this was precisely what happened in this case. In coming to this conclusion on causation, Her Ladyship opined that there must have been some leakage or breakage within Pallet No 5 resulting in the ignition and the ensuing explosion. This finding of the learned trial judge was criticised on the grounds that it ignored the joint conclusion of the two experts that the cause of the ignition was unknown; no evidence was tendered to establish any form of leakage or breakage or contamination within Pallet No 5 bearing in mind that the cargo was received clean on board the vessel and remained good for two days after loading, until the vessel commenced loading of steel next to this cargo.

[20] Learned counsel for the appellant also referred to the findings of the learned trial judge in para 77 (a) and (b) that:

(a) the packing of the chemicals in Pallet No 5 was essentially flawed as it contravened both the IMDG Code as well as contravened the incompatibility caution sounded by the shipper itself; and

(b) there was no evidence before the court to establish whether the pallets were in fact completely or securely sealed so as to preclude any possibility of leaking, spilling or intermixing. It is not possible to state with any degree of certainty that there was no such inter mingling. On the contrary the sequence of events leads, almost inevitably to the conclusion that there was indeed an intermingling of the chemicals,

and submitted that these findings were not supported by the evidence before the court. Learned counsel for the appellant then submitted that these findings amount to a failure on the part of the learned judge to recognise the different obligations imposed upon the owners, as carrier of dangerous goods, to be familiar with the stowage requirements of dangerous goods carried by it. The case of *Brass v Maitland* was cited in support on this proposition.

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THE RESPONDENT'S CASE

Duty of the appellant to provide information concerning the nature and characteristic of the contents of the cargo

[21] The thrust of the submission of counsel for the respondent on this issue concerned the failure of the appellant to complete and submit to the respondent the data sheet called the Material Safety Data Sheet ('MSDS'). The significance of the MSDS is that the nature and the character of the chemicals in the various pallets of the appellant should have been disclosed in this document. It is common ground that the MSDS is generally prepared for the purpose, inter alia, of warning persons dealing with the product of any dangers that might be associated with its use, including fire risk, accidental spillage, and procedures for clean-up. Learned counsel for the respondent, then, referred us to the evidence of Captain Gu Ji Bon, the master of *The Sunrise Crane* [2004] 4 SLR 715 (CA) in the case bearing the same name, wherein he is reported to have acknowledged the need for a copy of MSDS to be furnished by the shipper to the recipient of the goods. Since it is common ground that the appellant neither completed nor delivered a copy of the MSDS in respect of the six pallets, learned counsel for the respondent submitted that the learned trial judge was correct in holding the appellant to be in breach of its duty for not disclosing matters which would otherwise have been included in the MSDS to the respondent.

[22] The rationale behind the need of the MSDS being that the carrier's degree of knowledge would determine the risk which it was prepared to undertake in the carriage of the appellant's cargo. Furthermore, the manner in which the appellant's cargo was to be stowed during the voyage would be dependent on the nature of the cargo. In this respect, learned counsel for the respondent rejected the submission of counsel for the appellant that to the extent that the chemical names of the agrochemicals and classification had been made known in DCN1 and DCN2, it was incumbent upon the carrier or master to make himself aware of these dangers. According to learned counsel for the respondent, to demand this of the respondent would amount to placing far too onerous a duty on the carrier and/or the carrier's agent. In short, the submission of learned counsel for the respondent was that the respondent carrier did not, and could not have been aware of the potential fire and explosion risk that the shipper's cargo comprised, because it was not given notice of the nature and characteristics of the chemicals and more particularly the effect of packaging the same together, particularly in Pallet No 5. According to counsel, in these circumstances, it followed that it cannot reasonably be concluded that the carrier consented, with knowledge of the nature and characteristics of the cargo, to carry the same and assumed the risks such cargo posed.

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[23] On the issue of proper stowage, learned counsel for the respondent submitted that to the extent the cargo provided by the appellant differed materially in that it was not merely toxic but inflammable and explosive, the respondent carrier could not be faulted if the cargo was not properly stowed. Learned counsel referred to the following passage in the judgment of the learned trial judge:

> As the carrier's precautions were appropriate for the kind of goods described in the contract, namely agrochemicals, but insufficient for the particular goods shipped, namely the mixture in Pallet No 5, ie sodium chlorate together with amines and malaxion, it appears that liability for the loss and damage suffered under art IV r 6 falls squarely on the shipper. This is because the carrier cannot be said to have received enough warning, nor could he reasonably be expected to have known of the particular characteristics of that dangerous cargo. He would have understood the danger to lie primarily in the context of toxicity, rather than explosive or fire danger. As such it cannot be said that the carrier agreed to bear the risk of this particular hazard.

in refuting the appellant's defence based on article III r 2 of the Hague Rules.

Burden of proof

[24] On this issue, learned counsel for the respondent in his submission contended that the burden of proof had shifted to the appellant because the respondent had during the trial sufficiently proved on a preponderance of probability that the damage to the vessel was caused by the appellant's negligence in shipping the chemicals without providing adequate warning. Learned counsel then referred to the evidence of the appellant's expert witness, Mr Chan Lim Heng wherein he agreed that sodium chlorate could be a potential source of ignition if it contaminated the wooden pallet and acknowledged that there would be friction on board the vessel during loading at Port Klang. Learned counsel for the respondent submitted that upon the appellant's expert witness conceding to the aforesaid two facts, then, the burden shifted to the appellant to adduce the following evidence to rebut its liability:

(a) that the bags containing Sodium Chlorate were waterproof and in good condition;

(b) that the Sodium Chlorate could not have spilled/leaked out of the bags especially since it had rained while the vessel was in Penang and Port Klang;

(c) that the wooden pallets were new, not reused ones and in good condition and free of contamination; and

(d) by the person who packed or who witnessed the packing of the chemicals corroborated by written contemporaneous record of such packing.

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Since it is common ground that the appellant did not lead evidence on any of the aforesaid four matters, learned counsel submitted that the learned Trial Judge was correct in holding the appellant liable particularly since, unlike the respondent, the appellant tendered no independent theory for the cause of the explosion.

Causation

[25] Learned counsel for the respondent submitted that the factors giving rise to the ignition and the ensuing explosion in the learned trial judge's grounds are consistent with those in the report of Cik Aini, the respondent's expert. The conclusion was that the ignition arose from the inflammable and explosive characteristics of the chemicals themselves rather than any unforeseen external source or event. Although the report suggest that the ignition could have arisen from the accidental mixing of the chemicals in Pallet No 5 it is also clear that the incident could equally have arisen from the reaction of Sodium Chlorate contaminating the wooden pallets.

[26] Learned counsel for the respondent then cited the pronouncements of Justice Mustill and quoted by the learned trial judge in para 113 of Her Ladyship's judgment as authority for the proposition that liability can be imputed to the appellant even if the exact cause of the casualty is unknown (see para 11 of this judgment for the relevant passage).

DECISION OF THE COURT

Introduction

[27] In our judgment, the outcome of this appeal depends on the answers to two questions. The first question is whether the cargo of six pallets delivered for carriage by the appellant were so fundamentally different from the cargo which the shipper contracted to deliver in terms of nature and character so as to entitle the respondent to claim that it never consented to carry this particular cargo. The answer to this question, in turn, requires us to ascertain the nature of the information furnished by the appellant pertaining to this cargo, the precautions undertaken by the carrier based on this information and what steps the carrier would have taken if provided with all the relevant information. Also relevant to this question, is whether the knowledge of the respondent is limited to what was made known to its officers orally or whether the knowledge of the respondent extends to the information contained in all the documents submitted by the appellant in connection with the shipment such as, on the facts of this case DCN1, DCN2, the packing list and shipping order.

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[28] In our judgment, the delivery of cargo so fundamentally different can amount to a breach of contract on the part of the appellant. The rationale being that the carrier's agreement to carry the cargo was procured by a misrepresentation as regards the nature and character of the cargo. However, to be entitled to an indemnity whether under the common law or article IV r 6 of the Hague Rules for this breach, it is a pre-requisite for the respondent to prove that this breach of contract 'directly or indirectly' caused the explosion of the vessel. The case of *The 'Athanasia Comninos'* is authority for the proposition that both under the common law and a claim under article IV r 6, the burden is vested on the respondent carrier to prove breach and that this breach is the cause for the loss suffered by the carrier (see p 280 of the reported judgment of the court).

[29] Accordingly, the second question is whether on a balance of probabilities, it was the information concerning the cargo which the shipper failed to provide which directly or indirectly caused the loss of the vessel. Implicit in this question is the issue of burden of proof. In other words, was the evidence led by the respondent as regards causation sufficient to cause the burden to shift to the appellant, thereby requiring the appellant to refute the evidence that it was the hazard caused by the appellant's cargo that caused the loss? We have intentionally posed this question in the context of burden of proof since it is the learned judge's finding that the respondent had discharged the initial burden of proof vested on it.

First issue — breach of contract

[30] Perhaps it is best that we set out the relevant portion of article IV r 6 for the purposes of this issue. Article IV r 6 of the Hague Rules which is applicable in Malaysia by virtue of s 2 of the Carriage of Goods by Sea Act 1950 provides as follows:

> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

[31] We gratefully adopt the summary of the principles of law governing the shipper and carrier's respective obligations under article IV r 6 set out in paras 10.326 of the book *Bills of Lading* by Aiken, Lord & Bools as equally representing the law of this country. The principles being:

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(a) a shipowner who consents to carry goods of a particular description, contracts to perform the carriage in a manner appropriate to goods of that description, and thereby assumes all risks of accidents attributable to a failure to carry in the manner;

(b) in the case of goods where even the accepted method of carriage will not eliminate the possibility of accident, the risk of such an accident is on the carrier;

(c) before the court can conclude that a shipper, has breached its duty by not disclosing that the cargo is of a dangerous nature, the cargo itself must pose a hazard which is of a totally different kind (whether in nature or degree) from those attached to the carriage of the cargo described, and the shipper failed to notify the carrier, of this particular hazard;

(d) in considering what is the appropriate method of carriage, the carrier is not expected to have the knowledge of an expert chemist but must adopt the modern practices of which he could reasonably be expected to become aware; and

(e) the knowledge of the carrier includes that which he and the crew ought to have.

[32] In our judgment the implication of principle (a) above is that the carrier as the party responsible for the safe carriage of the cargo is expected to examine the cargo and be familiar with its nature and contents before consenting to the loading of the cargo on board the vessel. The rationale for this principle is that the carrier is not obliged to accept any cargo which the master of the vessel is satisfied may not be safely carried in the vessel for the voyage in question. Accordingly, it is acknowledged by the authorities that the master of the vessel is entitled to withhold his consent to the carriage of any particular cargo either because of the nature and contents of the cargo or because of the insufficiency of the packing or simply because the vessel lacks the facilities for the proper stowage of the cargo. It is only when the master of the vessel is satisfied on all matters relating to the safe carriage of the cargo that he should authorize the issuance of a clean bill of lading. The master's decision as to how and where the cargo is to be stowed is very much dependent on his knowledge of the contents of the cargo and how it is packed. Accordingly, if the cargo is damaged notwithstanding having been carried in the accepted method of carriage, then, the carrier is liable for any ensuing damage to the cargo. For this reason, principle (b) above stipulates that if there should be any damage to the cargo or the vessel, for that matter, when the cargo was being carried by 'the accepted method of carnage', then, the risk of the accident is to be borne by the carrier.

[33] Principle (c) above caters for the situation where the cargo whether declared to be dangerous or otherwise, poses an unexpected hazard during the

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course of the voyage. According to this principle, the shipper cannot have recourse to the carrier for any damage to the cargo and may be liable to indemnify the carrier both under the common law and article IV r 6 of the Hague Rules if the unexpected hazard posed by the cargo causes damage to the vessel. The rationale for this principle is best explained by Justice Pearson in the *Atlantic Oil Carriers Ltd British Petroleum Company, Ltd (The Atlantic Duchess')* [1957] 2 Lloyd's Rep 55. His Lordship explained the rationale in this manner:

> I now come to the next main section of this judgment, involving consideration of the Plaintiffs' contention, which is broadly to the effect that *the additional quantity of butane which had been injected into this oil involved special hazards, of which no sufficient warning had been given by the defendants to the Plaintiffs*. (at p 95)
>
> ... this is not a case of cargo which looks safe and according to its description ordinarily would be safe but owing to some special and not obvious feature is in fact dangerous. *This cargo was declared in advance to be a cargo of crude oil, and it is well known that crude oil is highly dangerous and stringent precautions have to be observed in carrying it*. The Plaintiffs have to say that, in addition to the familiar dangers of ordinary crude oil, there was in this botanized crude oil some special hazard, *some really different danger outside the range of those danger which a carrier of crude oil normally has to foresee and guard against*. It may be they have to show a danger requiring precautions to be taken which would not be required in the carrying of ordinary crude oil. At any rate, in deciding whether there is or is not a special hazard involved, the presence or absence of a need for taking special precautions must be an important criterion. *And if there is a special hazard, how much warning has to be given? Not a lecture on physics and chemistry, because that would not be commercially practicable*. If all that is needed is to take the usual precautions with extra stringency and care, some informal warning to the master that this crude oil is worse than the usual might suffice. (at pp 95 and 96)

[34] What is evident from the above pronouncements of Justice Pearson is that the purpose of the shipper providing information pertaining to the nature and character of the cargo prior shipment is to assist the master in determining whether to carry the cargo and upon agreeing, how and where he should stow the cargo during the voyage. Hence the words 'Outside the range of those danger which a carrier of crude oil normally has to foresee and guard against'. That this is the objective for the shipper being required to furnish information concerning the additional risk posed by the cargo is reinforced by His Lordship's pronouncements, later in the judgment that 'At any rate, in deciding whether there is or is not a special hazard involved, the presence or absence of a need for taking special precautions must be an important criterion'.

[35] The aforesaid pronouncements of Justice Pearson must be interpreted in the context of the respective roles of the shipper and the carrier in the stowage of cargo during the voyage. To the extent that the shipper knows best its cargo, the shipper is obliged to furnish information of any special hazard such as some really different danger outside the range of those dangers which a

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carrier of agrochemicals normally would have to guard against. Similarly to the extent that the carrier knows best the stowage facilities available in the vessel, the carrier is responsible for the proper stowage of the cargo. That the carrier is solely responsible for the proper stowage of the cargo is evident from the passage in the judgment of Associate Chief Justice Scott in the case of *The 'Mahia'* (1955) 1 Lloyd's Rep 264. His Lordship opined that the responsibilities of the carrier for stowage were such that if the cargo was inherently dangerous or appeared dangerous on a visual inspection of the same, then, the master of the vessel was not obliged to even follow the instructions of the shipper as regards where the cargo should be stowed.

[36] According to principle (d), the master is required to adopt either the latest or at the least, the customary method of stowage for the particular cargo to defeat any claim arising from improper stowage. For instance in *The 'Atlantic Duchess'* although the cargo was not declared to be dangerous, since crude oil is known to be dangerous, the court ruled that the carrier with the knowledge of the usual dangers posed by a cargo of crude oil is expected to exercise all the usual precautions expected of a carrier involved in the stowage and carriage of crude oil.

[37] Principle (e) provides that the knowledge of the carrier as regards the nature and contents of the cargo is not limited to what is notified to him by the shipper but also includes all such information that the carrier ought to know in its capacity as a shipowner and information required by law to be known by a carrier. In *The Mahia*, the cargo was shipped on deck and the bills of lading indorsed 'on deck at shipper's risks'. Due to a fire and explosion at the port of discharge, the vessel was damaged during discharge. The shipowner sought an indemnity for the damage from the shipper alleging that the drum was shipped on deck on their instructions; that such inherently dangerous cargo should not have been shipped in deck in drums which were not watertight. The Superior Court of Montreal in dismissing the claim opined on this particular issue as follows:

> This is evidence led by Plaintiff. This testimony certainly does not support the contention that the drums were not suitable. It is too late now for Plaintiff to take the position that it did not know the drums were not watertight when it decided to stow them on deck. An examination of any one of these drums would have settled the point. Inches knew they were not watertight. So did Gignac. And McNab admits that he had shipped thousands and thousands of these containers of sodium chlorate before this shipment.

In other words, the captain or master of the vessel is expected to inspect the cargo prior shipment and upon the issuance of a clean bill of lading, the carrier is deemed to have knowledge of the contents of the cargo including the manner in which it has been packed prior shipment. Accordingly, the shipper is not liable for any damage arising from the contents of the cargo or arising from any

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insufficiency in the packing which deficiency would have been apparent to the carrier on an inspection of the cargo. Hence the opening words in the quote of the judgment of Justice Pearson in *The 'Atlantic Duchess'*:

> This is not a case of cargo which look safe and according to its description ordinarily would be safe but owing to the some special and not obvious feature is in fact dangerous.

(see para 33 of this judgment)

[38] With reference to the first question, the following undisputed facts and findings of the learned judge are relevant:

(a) First, that the appellant declared the cargo as dangerous and paid an additional premium in consideration of the respondent accepting the cargo for carriage;

(b) the appellant had identified the cargo by their chemical names in DCN1 and DCN2 and these documents were filed with the Penang Port Commission and to which documents the respondent had access by internet;

(c) the appellant led evidence that it had provided full particulars of the cargo to the respondent's agent namely Soo Hup Seng. The agent denied any such knowledge but not through the evidence of the alleged recipient of such information but through a witness whose evidence Her Ladyship herself described as 'hearsay' (see para 85 (c) of the judgment);

(d) according to the learned judge, Mohamad Fazil, a witness for the appellant gave evidence in para 26 of the judgment that:

> he placed 'SPONTANEOUSLY COMBUSTIBLE' stickers to all the six pallets containing the cargo. He then claims that the cargo was inspected together with all requisite documents including DCN2, the packing list and shipping order whereupon the cargo was brought alongside the vessel. The chief officer was present and after the cargo had been checked by him the cargo was 'marked'. This meant that the quantity and packing of the cargo as well as weight and size were checked. The cargo was accepted on board the vessel. The six pallets were then loaded onto the vessel on the starboard side at the bow or forward part of the main deck.
>
> The chief officer who was alleged to have inspected the cargo and the documents including the placement of the sticker 'SPONTANEOUSLY COMBUSTIBLE' did not attend court to refute this evidence;

(e) in any event, there is no doubt that the respondent was aware that the cargo included sodium chlorate. This is because the packing list included mention of this chemical and there is the unchallenged

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evidence of Mohamad Fazil that the chief officer had inspected all the shipping documents (see paras 38 and 39 of the judgment);

(f) the respondent issued a clean bill of lading following inspection of the cargo by the chief officer and according to the respondent's crane operator, he was directed by the chief officer to stow the cargo on the deck (see para 44 of the judgment);

(g) the appellant acknowledged not having notified the respondent that the cargo was hazardous but this was because in its view, it was not hazardous in the first place;

(h) the chief officer did not come to court and no evidence was proffered by the respondent as to the precautions it undertook in the light of the declaration that the cargo was dangerous nor did the respondent lead any evidence as what other precautions it would have undertaken if it had prior knowledge of the alleged additional dangers posed by this cargo by reason of the manner in which the chemicals had been packed together in Pallet No 5;

(i) the detailed evidence provided on behalf of the appellant by DW 1 as regards the manner in which the cargo had been packed was not challenged by the chief officer who had inspected the cargo before causing to be issued a clean bill of lading (see para 41 of the judgment); and

(j) the appellant's cargo was in the vessel for a full two days and there is not an iota of evidence to suggest that the contents of the six pallets manifested characteristics uncharacteristic for a cargo of agrochemicals.

[39] Applying the principles of law set out in paras 31 to 37 of this judgment to the facts and findings set out in para 38 of this judgment, we are of the considered view that the learned judge erred in holding the appellant to be in breach of contract. Our reasons are as follows:

A(a) first, Her Ladyship's finding of the appellant to be in breach of contract is primarily premised on the combination of the chemicals in Pallet No 5 which, according to Her Ladyship, contravened 'the IMDG Code as well as contravened the incompatibility caution sounded by the shipper itself' (see para 77 (a) of the judgment). The appellant's failure to inform the respondent in advance of this combination, in Her Ladyship's judgment, precluded the respondent from undertaking precautions to prevent / minimize friction and thereby 'avert the effects of the sodium chlorate' (see para 77 (f) of the judgment). In our judgment, the learned trial judge erred in coming to this finding because Her Ladyship failed to evaluate other relevant evidence in arriving at this finding;

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(b) the test to determine whether the shipper was in breach of contract by tendering fundamentally different cargo is set out in the judgment of Justice Mustill in The 'Athanasia Comninos'. This test being-

> 'I now turn to the legal problems which are of direct relevance to the present dispute. The first, and most important, is to find a general test which will permit the identification of those cargoes whose shipment is a breach of contract, in the absence of a specific warning as to their characteristics. In any view, it is essential when looking for such a test to remember that we are here concerned, not with the labeling in the abstract of goods as 'dangerous' or 'safe'. but with the distribution of risk for the consequences of a dangerous situation arising during the voyage. The character of the goods does, of course, play an important part in creating such a situation. But it is not the only factor. Equally important is the knowledge of the ship owner as to the characteristics of the goods, and the care with which he carries them, in the light of that knowledge. It is true that in some of the reported cases the courts have referred to the goods in question as 'dangerous'. This is perfectly understandable, for the goods were obviously of a type which created extraordinary hazards, and no problems of classification were in issue. The disputes related to the question whether the carrier had such notice, or knowledge, or means of knowledge of the hazards as to justify the conclusion that he had consented to accept the risk involved in carrying the good; see for example Great Northern Railway Co v. LEP Transport and Depositary, sup.; *Bamfield v Goole and Sheffield Transport Co* [1910] 2 KB 94.';

(c) based on the above, the learned trial judge was clearly right in placing great emphasis on the state of the shipper's cargo. However, where we are unable to agree with the learned trial judge is Her Ladyship's acceptance of the evidence of Cik Aini the expert witness of the respondent without regard to the admission made by this expert that her evidence was not supported by the facts. Indeed, to the extent that no member of the crew apart from the crane operator attended as a witness, there was no factual basis for the expert's opinion. For instance, the expert stated that the combination of the chemicals Sodium Chlorate, Malathion and CH Amine in Pallet No 5 posed a hazard, yet, she was unable to explain why one of the chemicals Malathion was placed under class 9 as environmentally hazardous only in the IMDG code. The witness also admitted that her knowledge of CH Amine was very limited. Finally when confronted with the evidence that CH Amine 48 is mixed with sodium chlorate as a pesticide and consequently cannot spontaneously ignite, the witness claimed that 'depends on the condition' (see the cross examination of Cik Aini by counsel for the appellant at pp 378 to 381 of Record of Appeal Vol 2 [1]) . However, when required to elaborate the particular condition that the witness had in mind, the witness only provided the following ambiguous answers:

> En.Joseph: This condition you are talking about. What conditions are you talking about? Because you do not say it in your report.

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Pn.Aini: Again I have to postulate conditions. But these are possibilities. You have aqua solution and if this liquid leak, you will have a bag full, kilograms and kilograms of sodium chlorite. This sodium chlorite, once the water dissolve, the water based liquid dissolve the sodium chlorite, it could impregnate the cardboard box which it is packed in. That is organic material and it could impregnate the wooden pallet. With any mild friction, it could ignite. This are possibilities. All you need is a little bit of friction and it could spontaneously ignite. I don't have supporting facts. This are postulations.

En.Joseph: My Lady, it sounds much more sensitive than a nuclear bomb. I have no further questions;

(Cross examination of Ms. Aini by Joseph, p 391 of Record of Appeal Vol 2 [2]).

(d) we need only refer to the pronouncements of Justice Mustill in *The 'Athanasia Comninos'* to demonstrate the need for the carrier to produce such factual evidence as a necessary prerequisite to discharge the initial burden of proof vested upon it to establish that the cargo delivered by the appellant was fundamentally different. For instance, in *The 'Athanasia Comninos'* the carrier produced the following evidence in support of its claim that the cargo tendered by the shipper was fundamentally different:

(a) 'evidence aimed at establishing, directly or indirectly, the gas emission characteristics of the cargoes in question, namely (1) direct evidence as to the characteristics of the cargo shipped on Athanasia Comninos. (2) Direct evidence as to the characteristics of other cargoes of 'Devco' coal. (3) Inferences drawn from the presence of an explosive mixture in the relevant compartment, combined with the results of measurements (and inferences drawn therefrom) as to the ventilation of the relevant compartments;

(b) inferences as to the emission characteristics of Devco coals in general, drawn from the gas contents of those coals;

(c) inferences as to the emission characteristics of Devco coals in general, drawn from gas in mine measurements in the Devco workings;

(d) inferences drawn from the fact that explosions occurred on board the two vessels, notwithstanding that (as the plaintiffs assert) the carriage of the goods thereon was conducted in a usual and proper manner;

(e) inferences drawn from the relative frequencies of explosions on board vessels carrying cargoes of Devco coal, by comparison with those occurring on vessels engaged in the carnage of other coals.

Although these various parts of the plaintiff's case are isolated for the purposes of discussion, they are, of course, relied upon cumulatively. Furthermore, although I have placed first in the list those arguments which are based on scientific evidence, since these occupied the majority of time at the trial, the plaintiffs were at pains to assert from the outset that arguments

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A on the inferences labeled '(D)' and '(E)' above, occupied a central position in their case'.

(see p 285 of the reported judgment of the court)

His Lordship with reference to the aforesaid allegations of the carrier as regards the breach of contract on the part of the shipper, then pronounced that to succeed, the carrier would have to satisfy the court that:

On the view of the law which I have expressed, it is necessary for the Plaintiffs to show that the emission characteristics of the cargoes in question fell outside the range of those contemplated by a contract to carry 'coal'. There are several comments which must be made concerning this requirement.

In the ensuing comments, His Lordship observed the need for the carrier to lead evidence by way of comparison in the characteristics of the two different cargoes ie a normal cargo and the fundamentally different cargo. The precise pronouncements of His Lordship being:

First, the characteristics of the two cargoes in question and of the 'usual' coal taken as a basis for comparison, are those of the coal at and after the moment of shipment. There is therefore little to be gained by comparing the gassiness of coals in the abstract. (at p 285)

(e) accordingly, in our opinion, it was imperative for either the master or the chief officer of the vessel to have attended court and provided factual evidence as to how, in their experience, the cargo of agrochemicals tendered by the appellant would have behaved during the voyage and how, in fact, the cargo in Pallet No 5 consisting of allegedly incompatible chemicals actually behaved during the voyage by way of comparison. In our view, in the absence of such factual evidence by way of comparison and in the light of the admissions made by the respondent's expert witness, the learned trial judge was wrong to rule that the cargo in the six pallets was fundamentally different from the cargo tendered by the appellant particularly in the light of the declaration that the cargo was dangerous;

B(a) the second factor in the test formulated by Justice Mustill is the knowledge of the carrier as to the characteristics of the cargo and the care with which it carries them in the light of that knowledge. According to Justice Pearson, there is a very low threshold imposed by the law upon the shipper concerning the amount of information that it is obliged to furnish the carrier as regards any special hazard. In the words of Justice Pearson 'some informal warning to the Master that this crude oil is worse than the usual might suffice' (p 96). With respect, Her Ladyship in holding the appellant to be in breach of contract failed to appreciate that the appellant had provided more than ample information concerning the cargo. First, the appellant had declared the cargo to be dangerous. Secondly, the evidence of Mohamad Fazil that the chief officer had

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examined all the shipping documents and witnessed the placing of the sticker 'SPONTANEOUSLY COMBUSTIBLE' was not refuted by the respondent's calling the chief officer. Thirdly, the person in the employment of Soo Hup Seng who was alleged by the appellant to have received information concerning the cargo was not called as a witness to refute the receipt of these documents. Fourthly, neither the master nor the chief officer attended court to refute their knowledge of the contents of the cargo based on the information furnished about the cargo to the Penang Port Commission by the appellant, bearing in mind that they had access to this information and the law expects them to acquire this information as part of their duty in determining how and where the cargo should be stowed;

(b) also relevant to this second factor is 'the care with which he carries them in the light of that knowledge'. As explained earlier in this judgment, the precautions undertaken by the carrier in the stowage of the cargo is based on its knowledge of the cargo. Accordingly, insofar as this second factor is concerned, the breach on the part of shipper arises only if the cargo posed a special hazard and the failure to notify the carrier of the special hazard caused the shipper to not provide against such a hazard by adopting more precautions in the stowage of cargo;

(c) with respect, in our opinion, to discharge the burden of proof vested on it in respect of this second factor, it was necessary for the respondent to lead evidence through the chief officer as to why he stowed the appellant's cargo on deck and under canvas when the cargo was declared to be dangerous. Additionally, there is the finding of the learned trial judge that 'sodium chlorate, it is further specified, must be kept well sealed and stowed in a cool, dry and well-ventilated place' (see para 68 of the judgment). In other words, the law expects an explanation from the chief officer of the vessel for stowing the agrochemicals on the deck and under canvas before the carrier can be said to have discharged the burden of proving breach on the part of the shipper. In our judgment, the error that the learned trial judge fell into in the consideration of the second factor is that Her Ladyship proceeded on the premise that stowage was the responsibility of the shipper. With respect, as highlighted earlier in this judgment, it is settled law that stowage is the responsibility of the carrier. This error on the part of the learned trial judge in appreciating the responsibility of the carrier for the proper stowage of the agrochemicals caused Her Ladyship to erroneously rule in para 77 (f) of the judgment that:

> There were no instructions given to the carrier about the stowage of the pallets in accordance with the IMDG Code. A perusal of the segregation table shows that the chemicals in question ought to have been packed separately as well as placed apart from each other on the top deck of the vessel. Friction ought to have been minimized to avert the effect o the sodium chlorate.

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(d) with respect, Her Ladyship's erroneous belief that stowage was the responsibility of the shipper resulted in Her Ladyship's ruling in para 90 that the precautions undertaken by the carrier in the stowage of the cargo was appropriate for the carriage of the agrochemicals 'but insufficient for the particular goods shipped, namely the mixture in Pallet No 5' (see para 90 of the judgment). With respect, in the absence of evidence forthcoming from the chief officer as to why he stowed the cargo on deck in the first place, and what other precautions he would have undertaken if he had the alleged additional information, the learned trial judge erred in drawing this inference favourable to the respondent. In drawing this inference favourable to the respondent, the learned trial judge also failed to appreciate the unchallenged evidence of DW1 that the respondent was familiar with the packing of the appellant's cargo including Pallet No 5 and must have caused the issuance of the clean bill of lading after being satisfied that the appellant's cargo was suitable for safe carriage during the voyage.

Causation

[40] As stated earlier in this judgment for the respondent to succeed in its claim for the indemnity, it must not only prove breach of contract but also that this breach caused the explosion on board the vessel. The learned trial judge was conscious of this requirement as evidenced by Her Ladyship's findings in para 77 of the judgment. Her Ladyship ruled the cause of the explosion on the vessel to be due to friction and increased temperature coupled with the packing of the mutually incompatible chemicals together in Pallet No 5. The learned trial judge sought to overcome the absence of any factual evidence that the agrochemicals posed a special hazard during the voyage by holding that since there was no evidence that the pallets were securely sealed so as to preclude any possible leaking, spilling, or intermingling, 'the sequence of events leads, almost inevitably to the conclusion that there was indeed an intermingling of the chemicals'. In Her Ladyship's view, this intermingling coupled with the high temperatures on the deck would have had consequential effect on the chemicals particularly since the vessel was in constant motion. For this reason, Her Ladyship ruled that the explosion could have been averted if the pallets had been segregated 'to preclude the effect of friction on the floor of the vessel' (see paras 77(b) and (c) of the judgment).

[41] Her Ladyship further ruled (this seems to be the case to us) that, in the alternative the judgment in favour of the respondent could also be justified based on the pronouncements of Justice Mustill that in certain circumstances liability to indemnify can be imputed on the shipper even if the cause of the explosion was unknown. Applying the pronouncements of Justice Mustill to the facts of this case, Her Ladyship opined that:

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Applying the foregoing to the instant case if one were to ask of the instant case, why was there an explosion, the answer would be, because of the manner in which incompatible chemicals were packed in Pallet No 5 and/or because of the presence of sodium chlorate which was not segregated. The explosion could not have occurred without the shipment of these pallets as is borne out by the forensic evidence. In other words, the explosion arose because the shippers called on the vessel to load and carry those pallets. It might be added, the shipper sought to do so without advising or cautioning the carrier of the type or nature or kind of danger that could potentially arise. This answer therefore is sufficient to found an indemnity albeit under the Hague Rules in Schedule 1 to COGS A or in common law. (see para 114 of the judgment).

[42] In our judgment, the learned trial judge's conclusions on causation are flawed for the following reasons:

(a) the learned trial judge overlooked that the only witness of fact concerning matters that transpired in the vessel was Luka, whose only job was to load the cargo. In the absence of factual evidence, Her Ladyship's finding that the appellant's cargo must have leaked, spilled and/or comingled is not supported by the evidence before the court. Furthermore, Her Ladyship's finding that the pallets may not have been securely sealed flies in the face of the unchallenged evidence of DW 1 set out in paras 41 and 53 of Her Ladyship's judgment. In our judgment, Her Ladyship was wrong to disregard DW 1's evidence purely because 'regrettably there was no evidence to verify this process of shipment'. In other words, Her Ladyship sought to punish the appellant for the failure of the respondent to call its chief officer to either verify or challenge the evidence of DW 1;

(b) Her Ladyship's findings on the suitability of the mode of packing adopted by the appellant and how this may have contributed to the explosion completely disregard the unchallenged evidence of Mohamad Fazil that the chief officer had examined the cargo and all of the shipping documents before instructing Luka to load the appellant's cargo on board the vessel. It is settled law that the carrier is treated as having notice of the dangerous character of the goods if he has had a full opportunity of observing the dangerous character of such goods (see *Scrutton on Charter-parties* (15th Ed) p 116). In other words, the respondent cannot rely on any deficiency in the packing or errors in the segregation of the cargo that was apparent on a visual inspection of the cargo. Accordingly for the respondent to succeed on the grounds of improper packing or poor segregation of the chemicals, it was imperative for the master or chief officer of the vessel to attend court and provide evidence as to why the improper packing or the lack segregation of the chemicals was not discoverable during their visual inspection of the cargo. In the light of the respondent's failure to tender any such

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factual evidence, in our judgment, it was not proper for the judge to draw inferences that the appellant's cargo was not securely sealed and properly packed or not properly segregated and consequently must have contributed/caused the explosion;

(c) the learned trial judge in several paragraphs of her judgment appeared to rule that it was part of the duty of the appellant to provide proper instructions to the respondent on matters relating to stowage. For instance, in para 25, Her Ladyship observed that:

> It is not in issue from the evidence that neither Defendant gave any shipping or handling instructions
>
> (see para 25 of the judgment).

Similarly in para 86 of Her Ladyship's judgment, Her Ladyship observed that:

> It may well be the case that if there had been no ignition caused by friction or heat that the explosion might not have occurred. But that would have required specific steps taken to obviate the possibility of overheating through raised temperatures and avoiding friction, all of which would have required specific instructions on the method of stowage.

Presumably influenced by Her Ladyship's view that the appellant owed the duty to provide the respondent with instructions on the mode of stowage, Her Ladyship made an express finding in para 77 (f) of Her Ladyship's judgment that part of the cause of the accident was that:

> There were no instructions given to the carrier about the stowage of the pallets in accordance with the IMDG Code.

(d) with respect, it is settled law that it is no part of the duty of the shipper to instruct the carrier on how and where it should stow the cargo. Indeed, as explained earlier in this judgment, the duty of the carrier on matters relating to stowage are such that the carrier is not bound by any instructions furnished to him by the shipper or charterer on matters relating to stowage. Accordingly, the learned trial judge erred in finding the appellant's failure to give such instructions as part of the cause for the explosion. However, we observe that in practice it is not unusual for a carrier to follow the instructions of the shipper or charterer as regards the stowage of the goods conditional on the shipper or charterer providing a suitable indemnity for any damage suffered by the carrier in following any such instructions of the shipper/charterer. However, this is not the case here;

(e) the learned trial judge's findings on the cause of the ignition and how such ignition resulted in the ensuing explosion was in disregard of the

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joint statement of the experts representing both parties that the cause of the ignition was unknown. Additionally, according to the learned trial judge, the evidence of the carrier's expert was to be preferred because she provided a plausible reason for the explosion whereas the appellant's expert was unable to proffer any reasonable theory for the explosion (see para 77(g) of the judgment). With respect, this reasoning of the learned trial judge is flawed because the burden of proof is upon the respondent and the appellant is perfectly entitled in law to defeat the respondent's claim purely on the ground that the respondent has failed to discharge the initial burden of proof vested upon it. In this respect, we beg to differ with the learned judge that the respondent had discharged the burden of proof by merely tendering a more plausible reason for the explosion. With respect, this finding of the learned trial judge disregards the fact that the evidence of the respondent's expert was not supported by any factual evidence, as highlighted earlier in this judgment. Such factual evidence as regards what transpired during the voyage with the cargo were peculiarly within the knowledge of the carrier and, yet, neither the master nor the chief officer gave any evidence of the so called special hazard posed by the appellant's cargo during the voyage;

(f) still on the issue of burden of proof, it would be remiss of us not to deal with the submission of learned counsel for the respondent that the burden of proof shifted to the appellant to adduce evidence on the four matters set out in para 24 of this judgment. With respect, we are unable to agree with this submission of learned counsel for the respondent. As regards the first concession, the fact of the matter is that the respondent led no evidence of the sodium chlorate having contaminated the wooden pallet. As regards the second concession, since the duty to properly stow the cargo is the responsibility of the respondent, it is for the respondent to lead evidence as to what steps it undertook to segregate the cargo in anticipation of the friction during loading in Port Klang. Learned counsel for the respondent in making this submission, in our opinion, also failed to appreciate that the explosion took place when other cargo were being loaded onto the vessel and neither the master nor the chief officer provided any evidence to exclude the possibility of such loading having had an impact on the explosion. Finally, the evidence of Captain Gu J Bon in *The Sunrise Crane* of the need for the shipper to deliver a copy of MSDS is irrelevant as in that case, the court was dealing with already contaminated cargo.

[43] We now propose to deal with the ruling of the learned trial judge that the appellant can be liable to indemnify even if the cause of the explosion was unknown. As highlighted earlier in this judgment, Her Ladyship's ruling to this effect was premised on the pronouncements of Justice Mustill in *The 'Athanasia Comninos'* but in relation to the second vessel 'Georges CHR Lemos'. With

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respect, in our judgment, Her Ladyship's reliance on the passage set out in para 113 of Her Ladyship's judgment was misplaced and the result of Her Ladyship's misreading of part of Justice Mustill's decision, no doubt, pursuant to the submission of counsel for the respondent. We make this observation about the submission of the counsel for the respondent as the same submission was made before us. In our judgment, a careful examination of the judgment of Justice Mustill in *The 'Athanasia Comninos'* will reveal that the passage cited in para 113 of the judgment of the learned trial judge was made by His Lordship with reference to the vessel 'Georges CHR Lemos' and not *The 'Athanasia Comninos'*. Our understanding of the judgment of Justice Mustill is that what appears in para 113 was with reference to the liability of the charterer under cl 8 of the time charter and not in respect of the indemnity pursuant to article IV r 6. Clause 8 reads follows:

> ... The Captain (although appointed by the Owners) shall be under the orders and direction of the charterers as regards employment ...

With reference to this clause, Justice Mustill observed that:

> It has long been established that a provision in this form impliedly requires the charterer to indemnify the shipowner against the consequences of complying with an order as to the employment of the ship. Mr. Tomlinson, for the time charterers, did not dispute that an order as to the receipt of cargo on board the vessel falls within the scope of the indemnity. Subject to a point on Art. IV R 3 of the Hague Rules, to which I shall refer later, in relation to the claim by the owners of Georges Chr. Lemos, Mr. Tomlinson accepts that the claim against his clients will succeed if the order to ship the cargo can be regarded as the cause of the explosion. (At p 290)

Accordingly, when it came to dealing with liability pursuant to the indemnity in respect of the vessel 'Georges CHR Lemos' the claim was dismissed since according to Justice Mustill:

> I have already dealt with various aspects of this calculation elsewhere in this judgment, from which it will be apparent that I am unable to base any conclusion upon it. Apart from this, the Plaintiff's case on breach is the same as in respect of Athanasia Comninos, and must fail for the same reasons. (At p 294)

However, in relation to the liability of the charterer, Justice Mustill opined that by reason of cl 8 of the time charter, the charterer may be liable to indemnify pursuant to cl 8 notwithstanding the carrier being unable to prove breach. This is evident from the following passage in the judgment of His Lordship:

> This still leaves the question of causation, since the Plaintiffs can make good their case against the first defendants without proving a breach, if they can establish that the shipment of the cargo caused the loss. (p 294)

[44] Accordingly, the judgment of Justice Mustill in *The 'Athanasia Comninos'* when properly understood means that the learned trial judge's reliance on His Lordship's pronouncements as set out in para 113 was misplaced. For this reason, Her Ladyship's ruling on causation based on this

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passage in the judgment of Justice Mustill, with respect, was without basis in law.

CONCLUSION

[45] It was urged upon us by learned counsel for the respondent that our pronouncements in this appeal would have a bearing on the nature and extent of the duty of the shipper in terms of the information to be furnished to the carrier in respect of cargo delivered for carriage on board the vessel. With respect, in our judgment, the law on the respective obligations of the shipper and the carrier including the extent of such duties are already comprehensively set out in the judgments of the court in *The 'Athanasia Comninos'* and *The 'Atlantic Duchess'*. Accordingly, we do not see the need to make any new ground on this aspect of the law in this judgment. On the learned trial judge's decision itself, we are satisfied that the errors in the findings of fact and on the law relating to the respective obligations of the shipper and carrier are sufficiently material to warrant appellate intervention. In our opinion, this is one of those cases where the explosion may very well have been due neither to the unusual nature of the cargo nor to any short comings in the carrier, but to simple misfortune. In such cases, the risk of the accident falls on the carrier as opined by Justice Mustill at p 284 of the reported judgment of the court in *The 'Athanasia Comninos'*. However, we wish to add that the failure of any senior member of the crew of the vessel to give evidence and the absence of a suitable adjustor's report of the incident has played a big part in our finding that this accident may simply be a case of misfortune.

[46] Accordingly, we allow this appeal with costs. We set aside the orders of the learned judge of the High Court. We order the respondent to pay costs RM130,000 as costs here and below to the appellant. The deposit is to be refunded to the appellant.

Appeal allowed with costs of RM130,000 here and below.

Reported by Afiq Mohamad Noor